85-2068

Supreme Court, U.S.
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NO. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSTABLE WALTER H. RANKIN
and HARRIS COUNTY, TEXAS,
Petitioners

v.

ARDITH McPHERSON,
Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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47 pp

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QUESTIONS PRESENTED

1. Does a Deputy Constable serving at the pleasure of the Constable have a constitutional right to speak out favoring the assassination of the President of the United States?

2. Does a law enforcement officer have a constitutional right to speak out in favor of violations of the law the officer has undertaken to enforce?

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PARTIES TO THIS PROCEEDING

PLAINTIFF

Ardith S. McPherson
Attorney Annie S. Garcy
Attorney Bruce Griffiths

DEFENDANT

Constable Walter H. Rankin

Harris County Commissioners Court
County Judge Jon Lindsay
County Commissioner El Franco Lee
County Commissioner Jim Fonteno
County Commissioner Bob Eckels
County Commissioner E. A. Lyons, Jr.
County Attorney Mike Driscoll
Assistant County Attorney Billy E. Lee

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REFERENCE TO THE OPINIONS DELIVERED BELOW

On February 14, 1983, the Trial Court had an evidentiary hearing before ruling on Motions for Summary

Judgment presented by both parties. At the conclusion of the hearing the Trial Court ruled that the Constable lawfully terminated his Deputy. On April 15, 1983, the Trial Court filed its written Order and Final Judgment. (App. 1).

The plaintiff appealed to the Court of Appeals. By its opinion released on July 12, 1984, the Court of Appeals vacated the Trial Court's judgment and remanded it for trial. The Court of Appeals gave consideration only to the fact that the Trial Court said it was ruling on Motions for Summary Judgment. The Court of Appeals disregarded the lengthy hearing and finding of just cause for termination. It remanded it for trial on the merits to resolve any genuine issue of material fact and to make determinations as to the credibility of witnesses. (App. 2, and reported 736 F.2d 175).

On remand, the Trial Court conducted a new trial on January 21, 1985. After both parties rested, the Trial Court made into the record statements it considered its findings of fact and conclusions of law. (App. 3). On February 4, 1985, it filed its Final Judgment. (App. 4).

Plaintiff again appealed to the Court of Appeals. In its opinion released on March 19, 1986 (App. 5; 786 F.2d 1233), that Court held that Ms. McPherson's status was as an utterly ministerial clerk, and that the ill-considered statement by her did not make her unfit for her lowly job in the Constable's office. (On its own motion, the Court of Appeals on April 16, 1986, made two typographical corrections in its opinion and added a footnote to its opinion. Both Appendix 5 and the Federal Reporter reflect those changes from the original opinion.)

STATEMENT OF GROUNDS INVOKING JURISDICTION OF SUPREME COURT

(i) The opinion of the Court of Appeals was entered on March 19, 1986.

(ii) No rehearing was requested.

(iii) 28 U.S.C. § 1201(c) authorizes this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 6879a, Vernon's Texas Civil Statutes:

> Section 1. The duly elected Constable in each Justice Precinct may appoint Deputies in accordance with the provisions of Section 2 of this Act, and each and every instance said Deputy Constables shall qualify as required of Deputy Sheriffs.
>
> Section 2. When the Constable in each and every instance named and described in the preceding section of this Act shall desire to make appointment of a Deputy or Deputies, as the case may be, said Constable shall first make written application to the Commissioners' Court of his County showing that it is necessary for such Constable to have the Deputy or Deputies requested in order to properly handle the business of his office originating in the Precinct in which such Constable has been elected, giving the name of each proposed appointee; and if the Commissioners' Court shall find that the Constable is in need of the Deputy or Deputies requested to handle the business originating in his Precinct, then and in that event, and in that event only, the Commissioners' Court shall approve and confirm the appointment of the Deputy or Deputies provided by this Act.

Article 2372h, Vernon's Texas Civil Statutes, is lengthy, but Section 1 thereof can be summarized that a County officer may appoint a Deputy, direct and control the work of the Deputy, and terminate the employment at the pleasure of the officer.

Plaintiff alleged jurisdiction in her petition under the First and Fourteenth Amendments to the Constitution, and under 42 U.S.C. §§ 1983 and 1988, as well as under 28 U.S.C. § 1343(3) and (4), and 28 U.S.C. §§ 2201 and 2202. The Constable did not challenge any of the jurisdictional allegations in the Trial Court, or in the Court of Appeals, or in this Court.

STATEMENT OF THE CASE

At the request of a friend of hers who was a Deputy Constable, Ardith McPherson made application to Constable Rankin for appointment as a Deputy doing clerical duties. The Constable did appoint her and deputized her as his Deputy on January 12, 1981. His appointment stated that he appointed her having full confidence in her to be his true and lawful deputy, in his name, place and stead to do and perform any and all acts pertaining to the office of Constable. Her contract stated that she understood that her employment could be terminated at will by her employer. She also took and subscribed to the oath of office prescribed by § 1 of Article XVI of the Texas Constitution, that she would to the best of her ability preserve, protect and defend the Constitution and laws of the United States and of this State.

Harris County carries life insurance on all employees, including employees of the Constable. The insurance policy with the insurer does not become effective until

the employee has been in service 90 days. All appointments accordingly are temporary, and do not become vested until the 90 day in-service period is complete and the insurance coverage is accorded to the employee. The appointment of Ms. McPherson was terminated prior to the expiration of the probationary period, by some two weeks.

On March 30, 1981, President Reagan was shot in an attempt to murder him. Radio coverage was full and continuing on followup reports of the extent of the President's injuries and possibility of recovery. In the computer room in the Constable's office where Ms. McPherson worked was a radio, tuned to such a reporting. She was listening to the reporting that President Reagan would recover. She then said to a friend working with her that: "I hope if they go for him again, they get him." Captain LeVrier, a senior Deputy Constable, heard her statement, came up to her and questioned if she really meant that statement. In testimony to the Court, Ms. McPherson says she did not answer, she just smiled at the Captain. The Captain says she told him she did mean the statement. He then reported the conversation to the Chief Deputy Constable, who then told the Constable. The Constable called Ms. McPherson to his office and he asked her if she meant the statement. Testimony in the Court differs: Ms. McPherson saying that she did not mean it, and the Constable saying that she told him she did mean it. He then terminated her as his Deputy. She instituted this suit.

Aside from relief on the office telephone answering, Ms. McPherson fed information from Court process into a new system, a County-wide Justice Information Man-

agement System (JIMS), so that the various Courts, Court Clerks, Constables and Sheriff could call up on their own computers the information she fed into the system. Any official user of such information could track the current status of any process and be aware of exactly where the process was at any time and what, if any, problems were posed for the execution of the process. After the initial input of information by the Deputies in Constable Rankin's office, each agency thereafter handling the process added its input to the computer system, as information to all other agencies using the system.

CONTENTIONS IN SUPPORT OF THE PETITION

Texas law gives the Constable the authority to appoint only Deputies to assist him in the performance of his official duties. Had he not utilized the services of Ms. McPherson to feed information into the computer, HE would have to do such work. Had he not utilized the services of Ms. McPherson to answer his telephones, HE would have to do such work. His duties in a large metropolitan county are so voluminous that he cannot perform them by himself. He is aided by approximately 100 Deputies, all of whom he appointed with full confidence in their ability to do his official duties as he himself would do them. To the public, each of his Deputies is his *alter ego*. The public did not vote for his Deputies, the public voted for Walter Rankin. He is the only one who promised the people to uphold the law as Constable. When he appointed them, the Deputies promised *him* that they also would uphold the law in his place and stead. They swore to the Constitutional oath to protect, preserve and defend the Constitution and laws of the United States and

of this State. Murder and attempted murder are against the laws of the State of Texas and of all the civilized world. Murder and attempted murder of the President of the United States are violations of the laws of the United States. Espousal of such violations of law, a desire to see such violence committed against *anyone,* are contrary to the attributes that are a necessary part and parcel of the public expectation required of an officer of the law. An officer is an enforcing arm of the law. As its servant, the public has accorded to the officer a right to enforce the public's compliance with the laws of the land. The Court of Appeals deemed insignificant the amount of authority the Constable had invested in the duties assigned to Ms. McPherson. It is true that the Deputy had not served out her period of probation, and that she was not qualified by education and training to carry a weapon and act as a law enforcement officer under the professional standards established by the State of Texas, but she still was a *Deputy* of the Constable, doing his duties that had been assigned to her so that the Constable's personal time could be better utilized in the performance of other duties requiring the exercise of *his* professional training and standards as a law enforcement officer.

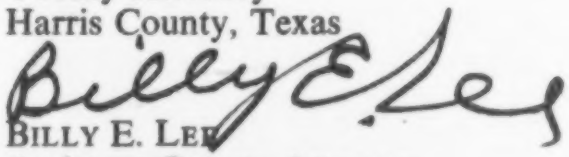
The Court of Appeals deemed her expression, wishing the President killed, as not disturbing the efficiency and morale of the office. Isolated by time and distance from the occurrence, the Court assumed incorrectly. The statement was uttered in a law enforcement office, by a Deputy supposed to be working at her assigned duties, and in the presence of other Deputies. Her statement was immediately challenged by a supervisor, Captain LeVrier, and, after that confrontation it was reported through channels to the Constable. The efficiency and morale of

the office WAS threatened. Professional law enforcement officers did consider such words in the context of being not only desirous of violations of elementary law but also an unprofessional expression in a law enforcement office, inconsistent with the oath taken by the speaker to protect, preserve and defend the laws.

WHEREFORE, petitioners pray the Court to grant this writ of certiorari to the Court of Appeals for the Fifth Circuit, that it reverse the judgment of that Court, and that it affirm the judgment of the Trial Court.

Respectfully submitted,

MIKE DRISCOLL
County Attorney
Harris County, Texas



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CERTIFICATE OF SERVICE

This is to certify that on this 16 day of June, 1986, true copies of this Petition for Writ of Certiorari were placed in the United States Postal Service, with proper postage prepaid, addressed to counsel of record for respondent:

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Billy E. Lee

BILLY E. LEE
Assistant County Attorney

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APPENDIX

1. District Court Order and Final Judgment dated April 15, 1983.
2. Court of Appeals opinion of July 12, 1984 (736 F.2d 175).
3. Partial Transcript of Proceedings, January 21, 1985, Remarks of the Trial Judge (pp. 178-184).
4. District Court Final Judgment dated February 4, 1985.
5. Court of Appeals opinion of March 19, 1986, as corrected April 16, 1986 (786 F.2d 1233).

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed April 15, 1983)

FINAL JUDGMENT

Based upon the findings of fact and conclusions of law entered this date, and pursuant to Fed. R. Civ. P. 58, judgment is hereby entered for Defendant. Plaintiff's claims for relief are in all ways denied.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 15th day of April, 1983.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed April 15, 1983)

ORDER

This is a suit alleging wrongful termination of employment in violation of Plaintiff's First Amendment rights of free speech. It is agreed that but for Plaintiff's statement on March 30, 1981, Plaintiff would not have been discharged on that date. There being no jury question to be decided, a hearing was held on February 14, 1983, to determine whether Plaintiff's speech was protected. Based upon the pleadings and evidence, the Court now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff Ardith McPherson is an adult citizen of the United States of America, and is a resident of Harris County, Texas.

2. Defendant Walter Rankin is the elected Harris County Constable for Precinct One (1). He is sued

both individually and in his official capacity as Constable. Defendant Harris County is a political subdivision of the State of Texas.

3. Defendant Walter Rankin, as elected Constable of Harris County, Texas, is authorized to hire employees subject to approval by said County, through its Commissioners' Court. Tex. Rev. Civ. Stat. Ann. art. 6879a § 2 (Vernon 1960).

4. Defendants at all times mentioned herein acted under color of state law.

5. Plaintiff Ardith McPherson was hired by Defendants on January 14, 1981, as a Deputy Constable of Harris County, Texas.

6. As a Harris County Deputy Constable, Plaintiff was required to operate a computer terminal entering and monitoring the progress of summonses issued within Defendant Rankin's precinct.

7. Defendant Walter Rankin employed Plaintiff for a ninety-day probationary period. At the time Plaintiff was terminated, she had two weeks of her probationary period remaining.

8. Plaintiff's application for employment, County Auditor's Form 3405, dated January 12, 1981, read, in part:

> I have read, understand, and accept the terms and conditions of this employment as recited above and in the personnel regulations adopted by the Commissioners' Court. I understand that my employment may be terminated at will by my employer without notice, without vacation, and without payment for overtime.

I certify that the statistical and personal data shown above are correct.

January 12, 1981. (signed) Ardith S. McPherson

9. The Deputation portion of Form 3405, signed by Constable Rankin the same date read:

> I, Walter H. Rankin, Constable, Precinct #1, of the County of Harris and State of Texas, having full confidence in Ardith S. McPherson of the said County and State, do hereby, with the consent of the Commissioners' Court of Harris County, Texas, duly entered of record _____, 19____ nominate and appoint him, the said Ardith S. McPherson, my true and lawful deputy, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Constable, Precinct #1 of the County and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue thereof. Payment of payrolls is to be in accordance with the personnel regulations adopted by the Commissioners' Court.
>
> Witness my hand at Houston, Texas, this January 12, 1981.
>
> (signed) Walter H. Rankin
> Constable, Precinct #1

10. Plaintiff's notarized oath of office, also on Form 3405 read:

> I, Ardith S. McPherson, do solemnly swear (or affirm), that I will faithfully execute the duties of Clerk of Harris County, Texas, and will to the best of my abilities preserve, protect and defend the Constitution and laws of the United States and of this State; and I, furthermore solemnly swear (or

affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the appointment to the above named position. So help me God.

Subscribed and sworn to before me at Houston, Texas, this January 12, 1981.

(signed) Ardith S. McPherson

11. Pursuant to Texas law, all employees of the Constable's office, regardless of job function, are deputy constables and must give the prescribed oath of office. See Vernon's Rev. Civ. Stat. Ann. art. 6879a and 6879b.

12. On March 30, 1981, during the lunch hour, Plaintiff and some other employees heard on an office radio, an announcement of the assassination attempt on President Reagan. Plaintiff concluded a discussion with a coworker about that event and about Reagan administration economic policies with the statement, "I hope if they go for him (President Reagan) again, they get him."

13. The statement was overheard by Captain Levrier, a Deputy Constable, who reported the incident to Constable Rankin. When summoned to Constable Rankin's office, and in the presence of the Constable, Captain Levrier, and Captain Abercia, Plaintiff confirmed that she made the statement in issue.

14. Plaintiff testified that she told Constable Rankin, "Yes, but I didn't mean anything by it." Plaintiff claims her statement did not signify an actual intent on her part to harm or to participate in harming the President.

15. Constable Rankin, Captain Levrier, and Captain Abercia each testified that Plaintiff repeated the statement in the Constable's office. The Constable testified that when he asked her whether she meant it, Plaintiff replied, "I sure do."

16. Constable Rankin instructed his secretary to take Plaintiff off the payroll immediately.

17. When Plaintiff returned the next day seeking an interview with the Constable, he refused to see her.

18. Constable Rankin testified that he lost all confidence in the Plaintiff's ability to be a Deputy Constable and as an employee of a law enforcement agency when she repeated (or acknowledged) her statement. He informed her there was no place for her in that office. He considers it a violation of one's sworn duty to uphold the U. S. Constitution and the laws of the State of Texas to espouse the assassination of any president, judge, or other public official. In his judgment, people would lose confidence in his officers and in him personally, and his credibility as a law enforcement officer would be destroyed if he retained an employee who endorsed such actions.

19. The Court finds that, regardless of the seriousness of Plaintiff's intent, the fact that she did make such a statement while on the job indicated to her superiors that she did not appreciate or possess the sensitivity and discretion required of a public employee. The Constable sincerely and earnestly believes that an individual possessing an attitude such as Plaintiff's is not a suitable employee of a law enforcement agency.

Conclusions of Law

1. This Court has jurisdiction of this case alleging a violation of Constitutional rights under color of state law pursuant to 28 U.S.C. § 1331.

2. A probationary employee such as Plaintiff McPherson may be fired for any reason, or even for no reason—but not for the exercise of her constitutional rights. *Perry v. Sinderman,* 408 U.S. 593, 597 (1972); *Van Ooteghem v. Gray,* 628 F.2d 488, 490 (5th Cir. 1980), on rehearing *en banc,* 654 F.2d 304 (5th Cir. 1981), *cert. denied,* 455 U.S. 909 (1982); *Garza v. Rodriguez,* 559 F.2d 259, 260 (5th Cir. 1977); *Megill v. Board of Regents of State of Florida,* 541 F.2d 1073, 1077 (5th Cir. 1976).

3. A public employee's private speech, as well as her public statements, may be protected. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979).

4. While public employment which may be denied altogether may not be subjected to unreasonable conditions, it is clearly established that the State has interests as an employer that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968).

5. An agency may regulate speech only as far as necessary to accomplish a legitimate government interest: to promote efficiency; to foster loyalty and obedience to superiors; to maintain morale; to instill public confidence in the law enforcement institution. *Gasparinetti v. Kerr,* 568 F.2d 311, 315-16 (3d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978). Also see, *Kannisto v. City and County*

of San Francisco, 541 F.2d 841 (9th Cir. 1976); *Muller v. Conlisk,* 429 F.2d 901 (7th Cir. 1970).

6. In certain instances a public employee may be discharged on the basis of speech without offending the First Amendment. *Arnett v. Kennedy,* 416 U.S. 134, 160 (1974).

7. In determining the free speech rights of a public employee, the Court must engage in a three-step analysis:

(a) Is the communication protected;

(b) If so, did it play a substantial part in the decision to fire the plaintiff;

(c) If so, would the employer have fired the employee even if the protected communication had not occurred. *Wilson v. Taylor,* 658 F.2d 1021, 1027 (5th Cir. 1981), citing *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 287 (1977) and *Pickering, supra; Van Ooteghem, supra* at 491.

8. In the case *sub judice,* the second and third prongs of the test are admitted by Defendant; only step one is in issue.

9. Whether the communication is protected is a question of law to be determined by the Court. *Van Ooteghem, supra,* at 492.

10. To determine whether the communication of a public employee was protected, the Court must balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering, supra,* at 568.

11. Plaintiff has the burden of establishing that her speech was protected. *Mt. Healthy v. Doyle, supra.*

12. In balancing these interests, the Court may consider such factors as the need for maintaining discipline by immediate supervisors, the need for harmony among co-workers, the necessity for personal loyalty and confidence between the employer and employee, the disruption to the workplace caused by the speech, and the public's need or right to comments and information from public employees on matters of general concern. See *Pickering, supra,* at 570; *Barrett v. Thomas,* 649 F.2d 1193 (5th Cir. 1981), *cert. denied* 102 S. Ct. 1969 (1982); *Van Ooteghem,* 628 F.2d at 492; *Tanner v. McCall,* 625 F.2d 1183 (5th Cir. 1980).

13. In striking the *Pickering* balance regarding private expression, a Court should consider the content and manner, the time and place of the speech. *Givhan, supra,* at 415, n.4.

14. In the case at bar, Plaintiff's comment did not disrupt the workplace in general. There was no criticism of her immediate superiors. However, the comment clearly undermined her employer's confidence in her as one of his deputies whose public comments and actions during work hours he would be deemed to have ratified. Further, Plaintiff's comment in no way served the public's interest in matters of general concern. While made during the noon hour, the comment was made in the office while at least some employees, including the Plaintiff, were working or as they returned to work from lunch, and loud enough to be overheard by nearby co-workers.

15. The Court concludes that the application of the *Pickering* balancing test shows Plaintiff's speech to be clearly unprotected.

16. Additionally, an employee cannot claim First Amendment protection for speech-related conduct where the ground for discharge was not the speech itself, but because it evidenced character traits undesirable in an employee. *Weisbrod v. Donigan,* 651 F.2d 334, 336 (5th Cir. 1981), *rehearing en banc denied,* 659 F.2d 1079; *Garza v. Rodriguez,* 559 F.2d 259 (5th Cir. 1977), *cert. denied,* 439 U.S. 877 (1978); *Megill v. Board of Regents of the State of Florida,* 541 F.2d 1073 (5th Cir. 1976). Also see *Phillips v. Adult Prob. Dept., City & Cty. of San Francisco,* 491 F.2d 951 (9th Cir. 1974).

17. The Constable's office maintains a strong interest in retaining only those deputies who possess and publicly manifest qualities of character that accentuate the high standards of the field of law enforcement. See *Megill, supra* at 1085.

18. It was not unreasonable for Constable Rankin to lose confidence in the ability of one who would make such a statement as Plaintiff's, at the time and place it was made, to project a suitable image for law enforcement personnel or to make consistently appropriate law enforcement job decisions.

19. Plaintiff McPherson's First Amendment rights were not violated by her discharge.

Done at Houston, Texas, this 15th day of April, 1983.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

APPENDIX 2

Ardith McPHERSON,
Plaintiff-Appellant,

v.

Walter RANKIN, Individually and In His Official Capacity As Constable, Precinct One of Harris County, TX and Harris County Texas,
Defendants-Appellees.

NO. 83-2399.

United States Court of Appeals,
Fifth Circuit.

July 12, 1984.

Former deputy constable brought suit against constable and county, alleging she was denied her rights secured by First and Fourteenth Amendments when she was fired by constable for a political remark she made to a co-worker during a private conversation. The United States District Court for the Southern District of Texas, Norman W. Black, J., entered summary judgment in favor of constable and county, and former deputy constable appealed. The Court of Appeals, Tate, Circuit Judge, held that substantial issues of material fact existed as to "context" in which statement was made, including whether deputy constable admitted to constable that she seriously meant what she said regarding attempted assassination of President and was not speaking in political hyperbole, precluding summary judgment.

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before TATE, JOLLY, and DAVIS, Circuit Judges.

TATE, Circuit Judge:

The plaintiff, Ardith McPherson, a non-tenured deputy constable[1] formerly employed by the defendant Constable of Harris County, Texas, appeals from the grant of summary judgment against her in her 42 U.S.C. § 1983 suit against Constable Walter Rankin and Harris County, Texas. The plaintiff McPherson alleges that she was denied her rights secured by the First and Fourteenth Amendments when she was fired by the Constable for a political remark made to a coworker during a private conversation. Finding that the existence of substantial issues of material fact made summary judgment inappropriate, we vacate the judgment in favor of the defendant Walter Rankin, and remand for a full trial on the merits.

On March 30, 1981, during lunch hour, McPherson and a coworker, after hearing of an assassination attempt on President Reagan, engaged in a brief, private conversation about their opposition to the President's policies on welfare and unemployment. The plaintiff concluded the discussion with the statement: "I hope if they go for him [President Reagan] again, they get him."[2]

---

1. McPherson was employed as a deputy clerk whose primary responsibility was to enter civil papers into a computer. Her duties were limited to clerical jobs. She did not wear a uniform nor was she authorized to carry a weapon or make arrests. She had no contact with the public other than occasionally answering the office telephone.

McPherson was hired for a ninety-day probationary period. At the time she was fired, two weeks of her probationary period remained.

2. The district court's version differs slightly from McPherson's accounting of what exactly was said. McPherson testified at the summary judgment hearing that she said, "[I]f they go for him again, I hope they get him."

A deputy constable overheard this statement and reported it to Constable Rankin who summoned McPherson to his office. McPherson admitted to the Constable that she made the statement. A genuine dispute exists in the factual showing, however, over whether she also admitted that she actually intended the remark as seriously made.[3] Constable Rankin then summarily fired the plaintiff.[4]

McPherson then in June 1981 sued Constable Walter Rankin and Harris County, alleging a violation of her constitutional rights under color of state law. 42 U.S.C. § 1983. Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, McPherson filed a motion for summary judgment. The defendant Constable Rankin responded and requested a dismissal, claiming that McPherson failed to state a cause of action upon which the court could grant relief. The district court considered the parties' opposing motions as cross-motions for summary judgment, and it ordered an evidentiary hearing, which was held on February 14, 1983, to determine whether the plaintiff's speech was protected under applicable First Amendment principles. Following the hearing, the district court granted summary judgment in favor of the defendant Walter Rankin; McPherson appeals.

[1] In reviewing a district court's grant of summary judgment, we are required to consider the evidence pre-

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3. Of the four persons present in Constable Rankin's office—Constable Rankin, Chief Deputy Abercia, Captain LeVrier, and Ardith McPherson—Rankin and LeVrier claim McPherson said she meant the remark, while Abercia did not recall whether Constable Rankin asked the plaintiff whether she meant what she said. McPherson argues that she pointedly told the Constable, "I didn't mean anything by it."

4. McPherson testified that she returned the following day to try to explain what she meant to the Constable, but was denied an interview.

sented in the light most favorable to the party opposing the motion. *Simon v. United States,* 711 F.2d 740, 743 (5th Cir. 1983). Hence, the factual recitals in the opponent's affidavit as well as hearing testimony of McPherson and her witnesses must be regarded as true for the purposes of this appeal.

[2, 3] If there is a genuine issue of material fact which would cause a dispute to reasonably be resolved in favor of the party resisting the summary judgment, the summary judgment cannot stand. *National Hygienics, Inc. v. Southern Farm Bureau Life Insurance Company,* 707 F.2d 183, 186 (5th Cir. 1983). That the movant appears to the court more likely than not to prevail at trial is no reason to grant summary judgment; it is not the province of the trial court on motion for summary judgment to weigh evidence, assess its probative value or decide factual issues. *Byrd v. Roadway Express, Inc.,* 687 F.2d 85, 87 (5th Cir. 1982). The standard is simply that the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

[4] Prior to its ruling granting summary judgment in favor of the defendants, the trial court ordered a hearing so that it could "hear testimony regarding the details of this incident, the intent and motivation of those involved, and the extent to which such speech by one in plaintiff's position affects the ability of the constable's office to perform its services efficiently." In determining whether private speech by a public employee is entitled to First Amendment protection, it is important to consider the context in which it is made, relevant considerations including the "manner, time, and place in which it is de-

livered," and the intention of the speaker. *Bickel v. Burkhart,* 632 F.2d 1251, 1256-57 (5th Cir. 1980).

In this instance, the statement was made by McPherson during the lunch hour in a conversation between McPherson and her boyfriend, a coworker. The conversation took place in a non-public computer room of the constable's workforce; only two other regular coworkers in the room were present at that time, and one of them that testified stated that she did not overhear the conversation when it took place. However, the conversation chanced to be overheard by a deputy constable, who had entered the computer room to pick up papers to take to other precincts. He immediately reported the conversation to the Constable Rankin, the defendant, precipitating the events and McPherson's discharge at issue.

At the evidentiary hearing, Ardith McPherson testified that her statement—"if they go for him again, I hope they get him"—was intended only as a verbal expression of her anger with the Reagan administration's social and economic policies. The plaintiff maintained that "it is just like if I ask my sister to pick me up somewhere and she's late and I say, 'Where is she.' and I said 'Wait till she get[s] here, I'm going to kill her.' That don't mean I'm going to kill her with a gun or knife or weapon. It is an expression of conversation." Hence, the essence of McPherson's contention is that her statement was merely a form of political hyperbole and was not intended to advocate harm to the President.

McPherson also testified that when confronted by Constable Rankin, she assured him that she "didn't mean anything by it," but was not allowed to further explain her comment to him. Constable Rankin testified that

when he asked Ms. McPherson whether she meant what she said, her reply was "I sure do."

[5] The issue of McPherson's intent[5] is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its "content, form, and context". *See Connick v. Myers*, ___U.S. ___, ___, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983), cited with approval in *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009, 1013, (5th Cir. 1984) (factors include employee's motives in voicing the expressions at issue and their context).

[6] Thus, in a § 1983 suit brought by a public employee against his public employer, the "manner, time,

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5. With regard to peripheral issues: In its order of January 10, 1983, the district court stated that it was "convinced that plaintiff's comment in no way constituted a violation of either 18 U.S.C. § 2385 or 18 U.S.C. § 871(a)." Secion 2385 provides for federal conviction for one who intentionally advocates the overthrow of the government. To violate section 871(a), one must "intelligently make a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing . . . it as a serious expression of intention to inflict bodily harm upon or take the life of the President." *United States v. Rogers*, 488 F.2d 512, 514 n. 3 (5th Cir. 1974), *rev'd on other grounds*, 422 U.S. 35, 95 S. Ct. 2091, 45 L.Ed.2d 1, *on remand* 519 F.2d 1084 (5th Cir. 1975).

It is not necessary to prove an intention to carry out the threat under section 871(a), *id.*, 488 F.2d at 514, but is necessary to prove a "true threat." In *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401, 22 L.Ed.2d 664 (1969), the Supreme Court found that the defendant's statement "if they ever make me carry a rifle the first man I want in my sights is L.B.J." was not a true threat, but a form of political hyperbole. Watts' "only offense . . . was 'a kind of very crude offensive method of stating a political opposition to the President.'" *Id.* at 708, 83 S. Ct. at 1402.

McPherson's intent is, however, significant in the present *civil* case, as a relevant factor in the overall context of the statement.

and place" of a statement, and the "context" in which it is made, as revealed by the whole record, is relevant to the determination of whether the statement is protected under the First Amendment. *Id.* ____ U.S. at ____, 103 S. Ct. at 1693.

The context of the speech is especially material when private expression is involved. In *Bickel v. Burkhart,* 632 F.2d 1251, 1257 (5th Cir. 1980), this court noted that when a public employee expresses himself publicly, the primary focus is on the content of his speech; however, where private expression is involved, the balancing test encompasses the manner, time and place in which it is delivered as well as the context in which the statement is made. *See Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415 n. 4, 99 S. Ct. 693, 696 n. 4, 58 L.Ed.2d 619 (1979).

The court's task is to fully consider each of these factors in applying the *Pickering (infra)* balancing test, which compels us "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

Based upon the testimony evinced at this hearing, the court issued an order on April 15, 1983, in which it concluded:

> The plaintiff's comment did not disrupt the workplace in general. There was no criticism of her immediate superiors. However, the comment clearly undermined

> her employer's confidence in her as one of his deputies whose public comments and actions during work hours he would be deemed to have ratified. Further, plaintiff's comment in no way served the public's interest in matters of general concern. While made during the noon hour, the comment was made in the office while at least some employees, including the plaintiff, were working or as they returned to work from lunch, and loud enough to be overheard by nearby co-workers.

Offering no further reasons for its determinations,[6] the court concluded that McPherson's speech was unprotected under the *Pickering* balancing test.

[7] As to the intent or motivation of the plaintiff, the trial court merely noted the discrepancy in the testimony regarding McPherson's intention in making the statement. The district court was, of course, unable to make a finding on this issue because of conflicts in the testimony on this material issue. Indeed, it is not the district court's function on a motion for summary judgment to resolve any genuine issue of material fact or make determinations as to the credibility of witnesses, but instead the court must consider the facts presented and resolve all doubts in the light most favorable to the non-moving party. *See Williams v. Shell Oil Company,* 677 F.2d 506, 509 (5th Cir.), *cert. denied,* 459 U.S. 1087, 103 S. Ct. 570, 74 L.Ed.2d 933 (1982).

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6. The court ostensibly engaged in an three-step analysis derived from *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 286, 97 S. Ct. 568, 575, 50 L.Ed.2d 471 (1977):
   1. Is the communication protected?
   2. If so, did it play a substantial part in the decision to fire the plaintiff?
   3. If so, would the employer have fired the employee even if the protected communication had not occurred?

[8, 9] On a motion for summary judgment, the moving party must demonstrate that the facts underlying all relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment should be denied. Fed. R. Civ. P. 56(c). As noted above, we perceive that substantial issues of material fact existed as to the "context" in which the statement was made,[7] including whether McPherson admitted to the Constable that she seriously meant what she said rather than spoke in political hyperbole.[8]

The issues presented in this case would more properly be resolved after a trial on the merits because we find the existence of substantial issues of material fact. We, therefore, VACATE the district court's summary judgment and REMAND for a full trial on the merits.

VACATED AND REMANDED.

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7. The court further held that McPherson's discharge was justified because her "speech-related conduct . . . evidenced character traits undesirable in an employee." If the plaintiffs speech was unprotected, then, under the terms of her contract as a non-tenured employee, she was terminable at will without notice by her employer. The justification for the discharge thus enunicated is necessary only if she was discharged for the exercise of protected speech.

Should, on remand after a full factual hearing, the district court determine that the plaintiff's speech was indeed protected, the court will then have to apply the remaining factors of the test expressed in *Mt. Healthy*, *see* note 8, *supra*. For instance, when an employee is fired, not for the content of what he has said, but for undesirable character traits evidenced by the speech, he may have no claim to First Amendment protection from the discharge. *See Garza v. Rodriguez*, 559 F.2d 259, 260 (5th Cir. 1977), *cert. denied*, 439 U.S. 877, 99 S. Ct. 215, 58 L.Ed.2d 191 (1978) (drunken, belligerent behavior accompanied by abusively foul language); *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1085 (5th Cir. 1976) (false and misleading public statements, profanity, disruption of public meetings).

8. Relevant to McPherson's due process claim implicated by her complaint, is the Constable's refusal, both on the day of the incident and the following day, to allow McPherson to explain herself.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff,

v.

WALTER RANKIN, Individually And In His Official Capacity As Constable, Precinct One (1), Of Harris County, Texas; And Harris County, Texas,
Defendants.

Houston, Texas

January 21, 1985

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE NORMAN W. BLACK

Appearances:

For the Plaintiff:

Ms. Annie S. Garcy
Mr. Bruce Griffiths

For the Defendants:

Mr. Billy E. Lee
Mr. John Mahoney

Court Reporter:

June Simon

* * *

Have someone who is not marching in step to our drummer, here in our midst as one of us. If we were talking about the Dolphins and the 49'ers, this would be just like a guard on the Dolphins coming back to the huddle there and telling the quarterback, Marino, that I hope that linebacker for the 49'ers smears you on the next play.

This is inconsistent with our team pattern here, and it is not a variation that we can live with, and it is not a variation that the Constitution expects a law enforcement officer to live with. Thank you.

The Court: All right.

Last word, Mr. Griffiths.

Mr. Griffiths: Very briefly, Your Honor. If this case hinges on Ardith McPherson being a law enforcement officer, I would suggest to the Court that the evidence was essentially uncontroverted that she was not such an officer. She was not trained, she was not commissioned, she was not authorized under the laws of the State of Texas to perform any service as a law enforcement officer. She was paid minimum wage to type documents—data off civil papers into the computer. That is her job. That is the undisputed evidence, that that was her job. And if she—if this argument—which apparently does rest on her being a law enforcement officer—then it must fail.

The Court: This is not any easier the second time around than it was the first. I have the greatest respect for the Plaintiff's position on free speech. I have an equal respect for the responsibility of a constable to maintain a proper office environment. I suppose while

listening to the testimony this second time and re-reading the Fifth Circuit's opinion and re-reading *Connick v. Myers,* I think I understand what the courts are trying to tell us.

There is no question but that Constable Rankin, in his decision, was bound by the First Amendment, through Section 1983. There is no question that Ms. McPherson was a probationary public employee; no question but that she was discharged. I really don't believe there is any question about what she said. In the context of the President's near assassination, she said words to the effect, "if they go for him again, I hope they get him."

The real dispute in the testimony was whether she affirmed those words to the captain who first approached her at her terminal, and once again to Constable Rankin. I believe that by words or deeds, she conceded having said those words to them, and made no attempt to retract them.

But I'm not sure that the real question in this case is what she meant. I think the language we are taking is from the case of *Bickel v. Burkhart,* and that is the language that is important in determining whether private speech by a public employee is entitled to First Amendment protection. To consider the context in which it is made, relevant considerations, including the manner, time and place, and of course later on, the Fifth Circuit says intent relates to context, so I guess the ideas of intent, manner, time and place all tie in to a definition of this equally ambiguous term, context.

The remarks that Ms. McPherson made were made to another employee, Mr. Jackson, in the hearing of a superior officer. I suppose that by the definitions I have

seen, that is certainly private speech. I suppose that is what the Supreme Court and the Fifth Circuit means by private speech, as opposed to going to the public with these things. I'm not sure what the questionnaire in *Myers* was. I guess it was private speech, as well. The questionnaire was rather broadly distributed, but it did concern only internal office matters.

Now, let's put what Ms. McPherson said, in context, as the cases tell us to do. The statement was made so that it sounded like a comment to a radio news report on the attempted assassination of the President. I had the erroneous impression at the original hearing, and carried it to the Fifth Circuit, that this was during her lunch hour, and it apparently was not. It was during the lunch hour, but she was actually on duty, as she just testified a few minutes ago. It was made in the office of the Constable, while she was on duty.

What is the intention of the speaker. I hope that the plaintiff is not suggesting that the intention of one race must be decided by different standards than the intention of another race. That, I find a very disturbing and disquieting theory. If we are to carry Dr. Kochman's philosophy into the law, then the constable ought to treat people differently because of their race, and that is clearly against the law.

I think that the constable was entitled to listen to the words that were said by Ms. McPherson, when she repeated them to him, were confirmed that she had said them to him, and judge those words by their ordinary English context. The constable never accused Ms. McPherson of threatening to go shoot the President again, as Mr. Hinckley had just done. Although he did report

this episode to the Secret Service, he did not fear her because she threatened to do harm to the President.

Then I suppose we get down to the serious question, what did she "mean." I don't believe she meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

It's not like the *Myers* case where Ms. Myers was trying to comment upon the internal affairs of the office, or matters upon public concern. I don't think it is a matter of public concern to approve even more to the second attempt at assassination.

I believe Constable Rankin is very concerned about the character and trustworthiness of the people in his office, as he is certainly entitled to be. He does do a great deal of work with the public. If the people he hires mistreat the public, disappoint the public, insult the public, Constable Rankin is not going to get re-elected, and he is not going to be following his sworn oath.

Certainly he had some concern about the security questions that Ms. McPherson would have access to; delicate information about the whereabouts of the President. I think that is far less significant in his motivation than the question of the statement by Ms. McPherson, indicating to him she was the kind of person who would be a bad employee, would be a negative influence in the office.

I think what we have at this point is the *Pickering v. Board of Education* balance test. Who has more right? Ms. McPherson, to say, if they go for him again, I hope they get him, or Constable Rankin's right to promote the efficiency of the public service, through his employees.

In looking at the balancing test, I have got to go with Constable Rankin, as I did on the initial hearing. I think applying the *Mt. Healthy City School District Board of Education v. Doyle* test, number one, is the communication protected, no, I do not believe it is. I do not believe that that is protected speech. But applying the second part of the test, it certainly was a substantial part in the decision to fire her, and I doubt that he would have fired her had she not made that comment. I know I'm not required to reach the second two points, having found against the plaintiff on the first.

In the context of those remarks, I do not believe that they were protected speech, and I believe that forecloses her under *Mt. Healthy* and *Garza v. Rodriguez*. All of these cases, of course, are cited by the Fifth Circuit.

I would have to do what I did before, after hearing the evidence before, and that is hold for the defendant.

Anything further, Counsel?

Mr. Lee: Nothing further.

Mr. Griffiths: Nothing Further.

Mr. Lee: Thank you, Your Honor.

The Court: Thank you very much for presenting this matter in a straighforward and efficient manner.

Mr. Griffiths: Your Honor, is the court—is that opinion from the bench the court's opinion?

The Court: Those will be my Findings of Fact and Conclusions of Law.

Mr. Griffiths: Thank you, Your Honor.

(Proceedings concluded)

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed February 4, 1985)

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58 and based on the findings of fact and conclusions of law entered on the record in this cause, judgment is hereby entered for Defendants. Plaintiff's claims for relief are in all ways denied. Each party in this action shall bear its own costs.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 4th day of February, 1985.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2129

OPINION

ARDITH McPHERSON,
Plaintiff-Appellant,

v.

WALTER RANKIN, Individually and in his Official Capacity as Constable, Precinct One of Harris County, Texas, and HARRIS COUNTY, TEXAS.
Defendants-Appellees.

(Filed March 19, 1986)

Before: Jerre S. Williams, Patrick E. Higginbotham, and W. Eugene Davis, Circuit Judges.

Opinion by Judge Patrick E. Higginbotham

Appeal from the United States District Court
for the Southern District of Texas

Norman W. Black, District Judge, Presiding

SUMMARY

Civil Service/Constitutional Law

Appeal from district court decision upholding the dismissal of a public employee after finding that a remark she had made was not protected speech. Reversed and remanded.

Ardith McPherson was a clerical worker in a Houston, Texas constable's office. After hearing a radio report of the attempted assassination of President Reagan on March 30, 1981, McPherson said to a co-worker: "[I]f they go for him again, I hope they get him." The statement was made to the co-worker at the end of a discussion about the President's policies. A deputy constable overheard the statement and reported it to Constable Rankin, who immediately questioned McPherson about it. When McPherson acknowledged both that she had made the statement and that she meant it, Rankin fired her. McPherson filed suit against both Rankin and the county. The district court held that the remark was more than mere political hyperbole, that it was not protected speech, and that Rankin could fire her for it. On appeal, McPherson argues that the district court erred in not recognizing the political nature of her speech and in concluding that it was not within the protective ambit of the first amendment.

[1] Only when a government employee engages in expression addressed to "matters of public concern" does the first amendment protect him from termination for such expression. If it is established that the speech in question is addressed to "matters of public concern," the first amendment interest in protecting the employee's freedom of speech must be balanced against the government's interest in maintaining discipline and efficiency in the workplace. [2] The record supports the district court's conclusion that McPherson expressed an actual wish for the assassination of the President. Although she has denied that this was her view and she is supported by the only person who heard the remark in context, her statement to Rankin that she "meant" what she said pro-

vides the requisite support for the district court's "factual" finding. [3] Regardless of her intent, however, her comment clearly addressed a matter of public concern, be it a hyperbolic expression of unhappiness with the President's policies or an actual wish for his assassination. Therefore, the value of protecting her right to express her opinion, however loathcome, must be weighed against competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities.

[4] Here, the government's interest does not outweigh the first amendment interest in protecting McPherson's speech. Her comment was made to a co-worker who, with the benefit of the remark's full context, was not offended. Constable Rankin specifically denied having fired her because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office. [5] Although a government agency is entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency, [6] because of the utterly ministerial nature of her duties, McPherson's potential for undermining the office's mission was trivial. She was one of a dozen clerk-typists, she was not a law enforcement officer, her job did not bring her into contact with the public, and she had no access to sensitive or important files. Under these distinct circumstances, McPherson could not be constitutionally fired for her expression of political opinion. Absent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

On March 30, 1981, President Reagan was shot. After hearing a radio report of the attempted assassination, Ardith McPherson, a clerical worker in a Houston, Texas constable's office, said to a co-worker: "[I]f they go for him again, I hope they get him." A deputy constable overheard the statement and reported it to Constable Rankin, who immediately summoned McPherson to his office to question her about the remark. When McPherson acknowledged both that she had made the statement and that she meant it, Rankin fired her.

McPherson sued Rankin and Harris County under 42 U.S.C. § 1983. After the district court granted defendants' motion for summary judgment, a panel of this court remanded for a trial on the merits. Noting McPherson's contention that "her statement was merely a form of political hyperbole and was not intended to advocate harm to the President," *McPherson v. Rankin*, 736 F.2d 175, 178 (5th Cir. 1984), the panel observed that "[t]he issue of McPherson's intent is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its 'content, form, and context.'" *id.* at 178-79 (citation and footnote omitted).

After the ordered trial, the district judge ruled from the bench, explaining:

> I'm not sure that the real question in this case is what she meant. . . . I suppose . . . that [this] is certainly private speech . . . I don't believe she

> meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

The court also found that Rankin had a need for employees who will not "mistreat the public, disappoint the public, [or] insult the public," and concluded by purporting to balance McPherson's speech-related interests against the interests of the constable's office in law enforcement. In holding that McPherson's remark was not protected speech, the court seems to have concluded both that McPherson actually hoped that the President would be killed and that Rankin could fire her for that view. In Constable Rankin's colorful words, he ought not be required to employ a person who "rides with the cops and cheers for the robbers."

II

McPherson argues that the district court erred as a matter of law in not recognizing the political character of her speech and in concluding that it was not within the protective ambit of the first amendment. She also urges that the interests of her employer do not outweigh her rights of free speech. Defendants reply that McPherson espoused "a violation of the criminal law of murder . . . completely inconsistent with the oath to uphold the laws to which both the Constable and the Deputy have been sworn [and that it] is not only the

right of the Constable but also his duty to terminate a Deputy's appointment when that Deputy apparently desires to see the criminal laws violated."

III

-1-

Hornbook law informs us that the first amendment, as applied to the states, *Wallace v. Jaffree,* 105 S. Ct. 2479, 2486 (1985), protects a very wide range of speech from suppression by the government. *See, e.g., Brandenburg v. Ohio,* 395 U.S. 444 (1969). Although not all spoken words are covered by the first amendment, *Konigsberg v. State Bar,* 366 U.S. 36, 49 n.10 (1961), constitutional protection extends to expression concerned with private matters, *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), as well as to speech that takes place in private. *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 415-16 (1979). A state would therefore face considerable constitutional obstacles if it sought to criminalize the words that were uttered by McPherson on the day the President was shot.

[1] The government has not sought to prosecute McPherson as a criminal, but to terminate her from a public job, which presents a very different set of legal questions. *See Pickering v. Board of Education,* 391 U.S. 563 (1968); *Connick v. Myers,* 103 S. Ct. 1684 (1983). Only when a government employee engages in expression addressed to "matters of public concern" does the first amendment protect him from termination for such expression: "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the

reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick,* 103 S. Ct. at 1690 (citations omitted). This rule is based on "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 1688 (footnote omitted). If it is established that the speech in question is addressed to "matters of public concern," we are required to balance the first amendment interest in protecting the employee's freedom of expression against the government's interest in maintaining discipline and efficiency in the workplace. *Id.* at 1686. In striking this balance, we must give *"full* consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *id.* at 1692 (emphasis added), and we must *not* demand that the government employer "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," *id.* (footnote omitted).

With these well-worn principles in mind, we must first decide whether McPherson was fired for her expressed views on a matter of public concern. She has maintained throughout this litigation that her statement was meant as a criticism of the President's social and economic policies, and no one has contended that she could constitutionally be fired merely for criticizing those policies. A difficulty arises, however, because she chose such a repulsive, nigh obscene, manner of making her criticism. Had she been fired solely for the disgusting manner of her expression, the first amendment would arguably pose no barrier to Constable Rankin's employment decision. We doubt that public employees could wrap the protective mantle of the first amendment around a string

of gutter words simply by appending a remark to the effect that those words describe some public figure or policy.

However, McPherson was undoubtedly fired because of the *content* of her speech. The district court judge found that McPherson's comment was "something more" than political hyperbole and he was apparently persuaded that she was fired because she honestly hoped that any future assassination attempt would be successful. Whatever her subjective intent, that is what she said and it is quite plausible that Rankin was telling the truth when he said that that is why he fired her.[1] Because the life and death of the President are obviously matters of public concern, we are therefore required to engage in *Pickering/Connick* balancing and to decide whether society's interest in protecting McPherson's freedom of speech is outweighed by the constable's interest in having employees who do not favor political assassination.

-2-

Constable Rankin is elected to a four-year term on a partisan ballot from Precinct One in Harris County, Texas. This precinct, with approximately three hundred fifty thousand residents, encompasses downtown Houston and a portion of its suburbs. It is wholly within the police jurisdiction exercised by the City of Houston and nearby suburban municipalities. The constable's office, which had eighty-odd employees in 1981, has no direct law enforcement role, and none of its deputies are "on

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1. Were there a substantial contention that McPherson was actually terminated for expressing disapproval of the President's policies, we would be faced immediately with the standard-of-review problems discussed *infra* Section III.3.

the street." Its primary mission is the service of process and execution of warrants issued by courts whose criminal jurisdiction is limited to Class C misdemeanors, which carry a maximum fine of two hundred dollars. Approximately eighty percent of the office's work involves the service of civil process, mental health warrants, and bringing juveniles to the courts. Though Rankin hinted that his office might somehow participate in providing security during presidential visits to Houston, he never explained how this might be, and the district judge did not regard it as a serious suggestion.

All employees in the office are officially referred to as "deputy constables," but only those who are commissioned peace officers may carry firearms, serve process, or execute warrants. To become a commissioned peace officer, one must undergo a background check, a psychological exam, and over 300 hours of training. McPherson, who received only two days of computer instruction when hired, was not a commissioned peace officer. She played an entirely clerical role within the office: seated at a desk with no phone, in a room of computer terminals closed to the public, her duty was to enter data from court papers into a computer's memory by typing at a conventional CRT.

McPherson testified without contradiction that her statement about the attempted assassination was made at the end of a discussion about the President's policies with a co-worker, Lawrence Jackson, whose duties were identical to hers. At trial, Jackson corroborated McPherson's testimony and explained that he understood her remark as merely "a response and an expression." He was not cross-examined. McPherson testified that Constable Ran-

kin did not allow her to explain the context of the overheard remark; Jackson, the witness to its context, was not consulted. Indeed, Rankin does not deny that the remark was part of a discussion between two employees about their opinions of the President's policies; he testified that because McPherson conceded that she "meant" the remark, he felt no duty to inquire further.

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For the purpose of applying the *Pickering/Connick* balancing test, we accept the district court's conclusion that McPherson actually hoped that the President would be assassinated. The precise fit of the clearly erroneous standard of review and our duty to make "an independent constitutional judgment on the facts of the case," *Connick,* 103 S. Ct. at 1692 n. 10 (quoting *Jacobellis v. Ohio,* 378 U.S. 184, 190 (1964) (opinion of Brennan, J.)), is not altogether clear. We are enjoined to "determine the meaning and application of those words of [the Constitution] which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect." *Pennekamp v. Florida,* 328 U.S. 331, 335 (1946) (footnote omitted). The task of simultaneously applying both independent and deferential standards of review is of course more difficult at their juncture than at their distant edges. *See generally, Bose Corp. v. Consumers Union of United States, Inc.,* 104 S. Ct. 1949 (1984). For example, when what was said and its context are undisputed, the con-

stitutional "status" of the speech is to be independently examined by an appellate court. When what was said, but not its context, is disputed, the choice belongs to the trier of fact; on appeal, the determination of what was said is subject to review by the clearly erroneous standard, and the constitutional "status" of the statement is given independent review. Yet, when a factual dispute centers not on what was said but on its context, the deference due a trial court's findings becomes less certain: factual conclusions about the speaker's intent, audience effect, and other elements of context are not so easily disentangled from a decision as to whether a statement was "political" or directed at "public concerns."

[2] With this caution in mind, we find that the record supports the district court's conclusion that McPherson expressed an actual wish for the assassination of the President. It is true that she has at every stage of this litigation denied that this was her view or the purpose of her statement, and she is supported by the only person who heard the remark in context. McPherson's subjective intent, however, was an historical fact, and her statement to Rankin that she "meant" what she said provides the requisite support for the district court's "factual" finding, which may have been based in part on the demeanor of the witnesses. The question is close, resting ultimately on an inference drawn from the inevitably ambiguous response to the question, "Did you mean it?" That inference is a slender but adequate reed: we are not left with the firm belief that a mistake was made in this finding of fact by the district court.

[3] Regardless of her intent, however, McPherson's comment clearly addressed a matter of public concern.

Whether her statement was an hyperbolic expression of unhappiness with the President's policies, or an actual wish for his assassination, it was evoked by and addressed to serious matters of public concern. Thus, the value of protecting her right to express her opinion, however loathsome, must be weighed against the competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities.

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[4] We are persuaded that the government's interest in maintaining an efficient office does not outweigh the first amendment interest in protecting McPherson's freedom of expression. Her comment was made to a coworker who, with the benefit of the remark's full context, was not offended. Constable Rankin specifically denied having fired her because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office.

[5] The government's strongest argument lies in Constable Rankin's contention that he should not have to employ *anyone* who "rides with the cops and cheers for the robbers." We understand this to mean that a government agency is entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency. Just as a hospital has a legitimate interest in ensuring that its employees are not committed to euthanasia, so a law enforcement agency cannot be expected to carry out its mission through officers who favor political assassination. We therefore agree that Constable Rankin's action in dismissing McPherson was

based on an important and legitimate government interest.[2]

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2. The government's interest in requiring that employees be loyal to the mission of the agency for which they work is somewhat different from the government's interest in limiting employees' criticism of their supervisors. The distinction can be illustrated by comparing this case with *Yoggerst v. Hedges*, 739 F.2d 293 (7th Cir. 1984). In *Yoggerst*, an employee of a state agency, after seeing newspaper reports that the agency's director had been fired, asked a co-worker, "Did you hear the good news?" After being disciplined for this remark, the employee resigned and brought suit pursuant to 42 U.S.C. § 1983. The Seventh Circuit held that the remark was not speech on a "matter of public concern" under *Connick*: "It is clear from the content of Yoggerst's statement that she was speaking *in her role as an employee* about her personal feelings and not in her role as a citizen on a matter of public concern. . . . The content of Yoggerst's speech was clearly about her relationship with the Director, a matter of no public concern; the fact that she spoke at a time when the Director's continued tenure in office was a matter of public interest does not alter this characterization." 739 F.2d at 296 (emphasis added) citation omitted). Thus, the result in *Yoggerst* was dictated by the central principle enunicated in *Connick*: the Constitution "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. . . . [T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over *internal office affairs*." *Connick*, 103 S. Ct. at 1690, 1691 (emphasis added).

Unlike Yoggerst's comment, Ardith McPherson's remark had no direct bearing on internal office affairs and was made in her role as citizen rather than in her role as a public employee: her assassination remark was made in the context of a discussion of Reagan administration policies. This distinction may strike some as unduly artificial, for it is true that an acceptance of political assassination, like acceptance of the illegal overthrow of the government, reflects a generalized disloyalty to the very principles on which our public institutions operate. Any government official would properly be quite distressed to find his subordinates expressing such disloyalty, and we acknowledge that there are arguments for the proposition that the first and fourteenth amendments, properly interpreted, do not require government agencies to employ persons who are opposed to the fundamental principles on which our government is based. The Supreme Court, however, has rejected these arguments and foreclosed our consideration of them. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (state may not constitutionally bar employment as public school teachers to persons who knowingly belong to organizations seeking the unlawful overthrow of the government); *Connick*, 103 S. Ct. at 1688-89 (reviewing related cases and reaffirming *Keyishian*).

[6] The difficulty with the government's position in this case, however, is that McPherson's duties were so utterly ministerial and her potential for undermining the office's mission so trivial. McPherson was one of about a dozen clerk-typists working in a closed room. She was not a law enforcement officer and she had none of the discretion or power associated with that position. Her job did not bring her into contact with the public, and the district court was not persuaded that she had any access to sensitive or important files. Were any of these factors different, we would have a different case. But in these distinct circumstances, we cannot say that McPherson could constitutionally be fired for her expression of political opinion. Absent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required. A large body of first amendment jurisprudence is built on the proposition that political liberty will best be secured in the long haul if the government tolerates as much diversity of opinion as its responsibilities will allow. Our first amendment jurisprudence is a boast that in a free society foolish ideas will fall of their own weight. The ideal of tolerance is sometimes sorely taxed in practice—when that happens, there is all the more reason to recall its long-term benefits. However ill-considerd Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office.

REVERSED and REMANDED for determination of an appropriate remedy.